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SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-489

CLARK COUNTY, a political subdivision of the State of Nevada,

Petitioner,

vs.

MARGARET TURNER, as Legal Guardian of LIONEL EUGENE HOLLINS, YOLANDA K. HOLLINS and MARVAR ADAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF CITY OF LAS VEGAS AS AMICUS CURIAE

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400 East Stewart Avenue
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QUESTIONS PRESENTED

1. Whether it is a proper application of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution to prohibit legislation by which the State treats victims of torts committed by governmental entities differently than victims of torts committed by private persons.

2. Whether the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the various states from protecting the governmental tort tortfeasor by requiring that the tort claimant gives special notice as a condition precedent to suit.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF CITY OF LAS VEGAS AS AMICUS CURIAE

By leave of this Court, the CITY OF LAS VEGAS, NEVADA, a Municipal Corporation, files this brief as amicus curiae.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada was rendered on June 6, 1973. A timely petition for rehearing was denied on June 25, 1973, and the petition for certiorari was filed by CLARK COUNTY within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

INTEREST OF THE AMICUS CURIAE

The amicus curiae, CITY OF LAS VEGAS, NEVADA, has an interest in this case in that it is subject to the provisions of NRS 268.020, which is the statute applicable to claims against the City of Las Vegas, Nevada, and is comparable to NRS 244. 245 and 244.250 and the decision of the Nevada Supreme Court raises an issue of great importance. If left undisturbed, the ramifications of the decision will repeatedly present themselves to the Courts of the State of Nevada. Further, the decision of the Nevada Supreme Court is in direct conflict with recent decisions of the Supreme Courts of other states and with the decisions of this Honorable Court.

The CITY OF LAS VEGAS will not take up the "merits", except to adopt the views expressed by Petitioner, CLARK COUNTY.

REASONS FOR GRANTING THE WRIT

I

The decision below decided a question contrary to the applicable decisions of United States Supreme Court.

The decision of the Nevada Supreme Court stands squarely in conflict with that of this Court as expressed in the case of McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393, 399 (1961), wherein this Court, on page 1105, stated that:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the

[1] See appendix attached hereto.

Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See Kotch v. Board of River Port Pilot Com'rs, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093; Metropolitan Casualty Ins. Co. of New York v. Brownell, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369; Atchison, T. & S.F.R.Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909." (Emphasis added.)

To allow a Court decision to stand which is an abrogation of the legislative intent allows said Court under the guise of judicial interpretation to avoid the plain, certain and mandatory provisions of a statute. Birmingham v. Weston, (1937) 233 Ala 563, 172 So 643, 109 ALR 970; Professional Firefighters, Inc. v. City of Los Angeles, 32 Cal.Rptr. 830, 384 P.2d 158.

Although the case of State of Arizona v. Wadsworth, 109 Ariz 59, 505 P.2d 230, involves the classification of drugs, it is analogous to the problem in this matter inasmuch as it points out that a classification must be unreasonable in order to be struck down by the Court and be a denial of equal protection. The Arizona Supreme Court relied upon this Court for guidance and stated, on page 233, that the guidelines set by this Court are as follows:

"The rules by which this contention must be tested, as is shown by repeated decisions of this Court, are these:

1. The equal protection clause of the 14th Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is

done only when it is without any reasonable basis, and therefore is purely arbitrary.

2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality.

3. When the classification in such a law is called into question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

4. One who assaults the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377 (1911). See also, Al Means, Inc. v. City of Montgomery, 104 So.2d 816.

In the case of State v. Wadsworth, 505 P.2d 230, the Court stated:

"This court is not concerned with the wisdom of the (legislation) nor may we substitute our judgment for that of the legislature in its choice of method of enforcement * * *. Our inquiry is limited to the question of whether the Act contravenes the state and federal constitutions. Wisdom, necessity, propriety or experience of the Act are matters exclusively within the province of the legislature * * *. If the facts underlying * * * (Act) * * * are fairly debatable as the number of decisions of appellate courts attests, the judgment of the legislature prevails. * * *" Skaggs Drug Center, Inc. v. United States Time Corporation, 101 Ariz 392, 397, 398, 420 P.2d 177, 182, 183 (1966). (Additional citations omitted.)

A statute is clothed with the presumption of constitutionality and a legislative determination as to what is a sufficient distinction to warrant a classification will not be overthrown unless it is palpably arbitrary. Subsequent Injuries Fund v.

Industrial Accident Com'n., 310 P.2d 7; People v. Finston, 29 Cal.Rptr. 165; Victor Chemical Works v. Silver Bow Co., 301 P.2d 730.

In the Nevada case of Boyne v. State ex rel Dickerson, 80 Nev 160, 390 P.2d 225, the Court stated on page 227:

> "In view of the general rule that all presumptions are in favor of the validity of statutes and that a classification made by the Legislature will not be overthrown unless it is palpably unreasonable and arbitrary, I think, that any inquiry into the constitutionality of a statute should be approached with considerable trepidation.
>
> The equality guaranteed by the equal protection clause is equality under the same conditions and among persons similarly situated. The Legislature may make reasonable classifications with respect to persons, businesses, property and other activities but those classifications must not be arbitrary and must be based upon some difference in the classes having a substantial relation to the legitimate object to be accomplished."

In the more recent Nevada case of City of Las Vegas, Nevada v. Ackerman, 85 Nev 493, 457 P.2d 525, the Court stated on page 530:

> "As it was aptly stated by the trial court: 'It is not the function of the Court to question the wisdom of the public, but to determine whether or not they have lawfully enacted the measure in issue.' In Turner v. Fogg, 39 Nev 406, 159 P. 56 (1916), this Court quoted with approval the reasoning of the Pennsylvania Supreme Court: 'If it were our duty to make the law, no doubt some of its provisions would be written differently, but we cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy. Questions of this character are for the Legislature, and not for the Courts.' "

In the 1973 case of Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization, App. 106 Cal.Rptr. 867, it was stated on page 871:

> "Neither due process nor equal protection imposes upon a state any rigid rule of the equality of taxation .... A legislature is not bound to tax every member of a class or none. It may make distinctions .... having a rational basis and .... they must be presumed to rest upon that basis if there is any conceivable state of facts which would support it." (Carmichael v. Southern Coal, 301 U.S. 495, at 509, 57 S.Ct. 868, 81 L.Ed. 1245; see also Stevens v. Watson, 16 Cal.App.3d 629, 94 Cal.Rptr. 190; People v. Herbert's of Los Angeles, 3 Cal.App.2d 482, 39 P.2d 829.)

II

The decision below confucts with the decisions of the Highest Courts of other states as to the proper application of the equal protection clause of the Fourteenth Amendment of the U.S. Constitution in relation to statutes which conditionally waive government immunity.

It must be pointed out that the right of suit against a governmental entity and the liability of said entity are two distinct things. In State of Arizona v. Stone, 443 P.2d 933, the Court of Appeals quoted from Stone v. Arizona Highway Commission, 93 Ariz 384, 381 P.2d 107 (1963), and stated:

> "However, the right to bring suit against the state and the liability of the state are two distinct things:
>
> > 'Immunity from an action is one thing; immunity from liability is another; hence the state does not waive its immunity from liability for the negligence of its agents, servants or employes by a statute con-

ferring jurisdiction only upon the court.' State v. Sharp, 21 Ariz 424, 428, 189 P. 631, 632 (1920).

Conversely, the abrogation of governmental immunity should have no effect, per se, upon the limitations placed upon the method and manner of bringing suit against the state. See 49 Am.Jr. States, Territories and Dependencies, Sec. 99, at 316; and 81 C.J.S. States Sec. 215(c) at 1310." (Emphasis added.)

And on page 935, the Court stated:

"In construing statutes, the overriding consideration always is the determination of the true legislative intent. Bushnell v. Superior Court, 102 Ariz 309, 428 P.2d 987 (1967). An important consideration in construing a statute is that the Court give some meaning to all of the language used in the statute, if this is possible. City of Mesa v. Killingsworth, 96 Ariz 290, 394 P.2d 410 (1964). . . . ."

The majority of jurisdictions direct that, as a condition precedent, compliance must be had with statutory provisions requiring a notice of a claim to be filed within a particular period of time before a cause of action can be filed against a governmental agency. The fundamental reasons why recovery for personal injuries against a municipal corporation should be barred was stated in the California Supreme Court in the case of Artukovich v. Astendorf (1942) 21 Cal.2d 329, 131 P.2d 831, revg on reh 125 P.2d 16, wherein the Court, in page 833 stated:

"The underlying principles upon which the authorities are based are (1) that neither the state nor any of its political subdivisions may be sued in the absence of specific statutory permission; (2) that where a right of action against the State or any of its political subdivisions is created by statute, such right may be circumscribed by any conditions that the Legislature may see fit to impose; and (3) that when the Legislature enacts a mandatory provision requiring in general terms that all claims must be presented before any action may be brought thereon, compliance

with such condition is an indispensable prerequisite to the bringing of any such action by any person regardless of his age or his physical or mental condition." (Emphasis added.)

The Supreme Court of the State of Tennessee in the case of Robinson v. Memphis (1937) 171 Tenn 471, 105 SW2d 101, upheld a judgment for the City of Memphis, stating, on page 102:

> ". . . It may be somewhat of a harsh rule to apply in some instances, to require a minor of tender years, and who may be, as alleged in this declaration, of such immature age and lack of mental capacity as to be unable to know or take cognizance of this requirement of the law; but the answer to this is that the statute has made no exception because of infancy or incapacity. That is a matter for the law-making body. It is the duty of the Court to enforce the law as it is made . . . ."

The right to sue a governmental subsidiary is principally on the ground that the right is created by statute and, therefore, the Legislature has the right to prescribe the conditions under which it may be exercised.

In the case of Johnson v. Fresno County (1944) 64 Cal. App.2d 576, 149 P.2d 38, it was contended by the Plaintiff that the statute involved which required ninety days in which to file a claim was arbitrary, capricious and unreasonable and deprived the Plaintiff of his right to remedy without due process of law. This was rejected by the Court since the right of action was created by statute, and since the statute placed a limitation of time in which the right was to be exercised, the right must be asserted within the time limited or it ceases to exist and could not be thereafter enforced.

It was held in Touhey v. Decatur (1911) 175 Ind 98, 93 NE 540, 32 LRA NS 350, 3 NCCA 390, that no violation of the Fourteenth Amendment or of the state constitution was involved in the holding that a claim against a municipality was barred because of failure to give notice within the sixty-day period

required by statute, even though the Plaintiff during the period in which the notice should have been given was physically and mentally unable to do so because of injuries received, the Court pointing out that, since the claim was a statutory one, the Legislature had the right to provide the conditions upon which an action could be maintained, without being open to constitutional objections.

Even in cases wherein infancy is involved, the majority of jurisdictions have ruled that lack of timely notice barred recovery for minors for injuries since, in the absence of legislative authorization, the notice requirement permits no exception.

The statutes NRS 244.245, 244.255 and 268.020 were passed by the Legislature of the State of Nevada to enable the state or political subdivision thereof to have reasonable notification of any and all claims that might possibly be filed against the particular entity. Prior to the enactment of these sections and the enactment of NRS 41.032 and 41.039, there was no right of action against a political entity, but having given up its governmental immunity, the state has set up a means whereby a claimant having a cause of action against the state or political subdivision thereof must, as a condition precedent, file a claim against the involved political subdivision. Again, in State v. Stone, supra, on page 935, the Court states:

> "Among the recognized purposes of a claims statute such as this is to permit the state to investigate the circumstances of claims against it, see C.J.S. States, Sec. 207(2), at 1276; and Olender v. State, 194 Misc. 583, 87 N.Y.S2d 578 (1949), and '* * * to establish an orderly procedure by which the legislature will be advised of claims in instances where no provision has been made for payment.' 45 Cal.Jur. 2d State of California Sec. 163, at 517-518. Purposes such as this are as well served by the investigation and planning for tort claims as in the case of those arising in contract or by statute."

Also the Alabama Supreme Court, in Grambs v. Birmingham (1919) 202 Ala 490, 80 So 874, stated on page 876:

". . . . When the claimant must needs resort to the Courts, he can only prevail against a diligent defense by alleging and proving that he has filed a statement according to the substantial requirements of the statute . . . . Some of the Courts have assumed to ingraft upon similar statutes provisos which permit waivers, but the weight of authority sustains our statement as to the law of the case . . . Most of the cases to the contrary are from Michigan, and we may note in connection with them that the statute of that state seems far from being as clear as ours in prescribing the filing of a statement or the serving of notice . . . , as a condition precedent to the bringing of suit . . ." (Emphasis added.)

Whenever a state or political subdivision thereof has a rational basis for classification, the question of the Fourteenth Amendment is not involved. To this effect, the case of DeFunis v. Odegaard, (Wash.) 507 P.2d 1169, states on page 1181:

"Generally, when reviewing a state-created classification alleged to be in violation of the equal protection clause of the Fourteenth Amendment, the question is whether the classification is reasonably related to a legitimate public purpose. And, in applying this "rational basis" test, (A) discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." McGowan v. Maryland, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed. 393 (1961). See also, Securities Corp. v. Smith, 153 N.E.2d 806; Collins v. State Bd. of Social Welfare, 81 N.W.2d 4.

Although the case of Whitfield v. Roth, App. 107 Cal. Rptr. 207, involved a medical malpractice action, the Court states on page 210:

"In order to assert an action against a public entity a Plaintiff must plead and prove compliance with the applicable claims statute (Solis v. County of Contra Costa (1967) 251 Cal.App.2d 844, 846, 60 Cal.Rptr. 99). Failure to do so is "fatal to the cause of action" (Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal.App.2d 905,

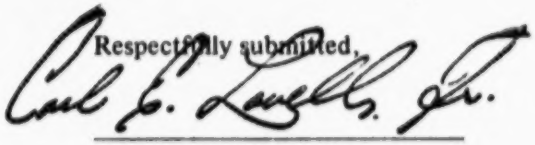
911, 48 Cal.Rptr. 245, 249). It has consistently been held that these claims requirements are applicable to minors, and that the time to file a claim is not tolled by reason of minority (Wozniak v. Peninsula Hospital (1969) 1 Cal.App. 3d 716, 723, 82 Cal.Rptr. 84; Van Alstyne, California Tort Liability Supplement (Cont.Ed.Bar, 1969), Sec. 8.6, pp. 91-92). And when the claimant is a minor, it is the parents' knowledge or lack of knowledge that is controlling in determining compliance with the claims requirement (Wozniak v. Peninsula Hospital, supra, at p. 723, 82 Cal. Rptr. 94)."

The only demand upon the law as it applies to due process or equal protection of the law is that said law shall not be unreasonable, arbitrary or capricious and that the means selected shall have a real and substantial relationship to the object sought to be obtained. See, Barrick Realty, Inc. v. City of Gary, Ind., 354 F.Supp. 126 (1973); Nebbia v. People of State of New York, 291 U.S. 502, 525, 54 S.Ct. 505, 511, 78 L.Ed. 940 (1934), quoted and followed in United States v. Toledo, Peoria & Western Railroad Co., 280 F.Supp. 243 (N.D.Ind. 1968).

CONCLUSION

For the reasons and cases reflected above, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Nevada.

Respectfully submitted,



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APPENDIX

268.020 Demands, claims must be presented within 6 months.

1. All demands and accounts and all claims of whatsoever kind, character or nature, or however the same may have originated against any incorporated city in this state, must be presented to the city council of the city, in writing, within 6 months from time such demands or accounts became due or payable, and within 6 months from the time the acts from which the claims originated shall happen. Claims for property damage, personal injuries and any other claim arising out of a tort shall be certified by the claimant before presentation. No other claim or account need be certified. The certification required by this subsection shall be in substantially the following form: "I hereby certify that the above and foregoing claim against the City of ....., State of Nevada, is just and reasonable, and that the claim is now due, owing and unpaid."

2. No such demand, account or claim against any incorporated city in this state shall be audited, considered, allowed or paid by the city council or any officer or officers of the incorporated city unless the provision of subsection 1 shall have been strictly complied with.

3. No such demand, account or claim which has once been rejected shall ever again be considered or allowed by the same or any subsequently elected or appointed city council of the same city.